

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air) File No. 15-MD-2666
Warming Devices Products) (JNE/FLN)
Liability Litigation)
September 18, 2017
Minneapolis, Minnesota
Courtroom 9W
9:30 a.m.

THE HONORABLE FRANKLIN L. NOEL
UNITED STATES MAGISTRATE JUDGE

(MOTIONS HEARING)APPEARANCES

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(Appearances continued on next page)

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21 Proceedings recorded by mechanical stenography;
transcript produced by computer.

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P R O C E E D I N G S

(9:33 a.m.)

THE COURT: Good morning. Please be seated.

Okay, this is In Re: Bair Hugger Forced Air Warming Devices Products Liability Litigation. And we're here for a hearing on the Defendant's motion to compel Miami VA Medical Center, and the government's motion to quash that subpoena. So let's first get everybody's appearance on the record. For the defendants?

MS. LEWIS: Good morning, Your Honor. Deborah Lewis on behalf of defendants 3M Company and Arizant Healthcare.

MS. AHMANN: Bridget Ahmann on behalf of the defendants.

MR. FULLER: Good morning, Your Honor. David Fuller on behalf of the United States and Department of Veterans Affairs.

THE COURT: Okay. Let's start with -- well, have you folks talked among yourselves about who wants to go first? These motions are the flip sides of one another, correct?

MS. LEWIS: It is.

MR. FULLER: Correct. I would assume that the defendants would go first.

MS. LEWIS: Yes, Your Honor.

1 THE COURT: You assume the same?

2 MS. LEWIS: Yes.

3 THE COURT: All right. Ms. Lewis?

4 MS. LEWIS: Thank you, Your Honor. Good morning.

5 THE COURT: Good morning.

6 MS. LEWIS: This is defendant's motion to compel
7 asking the Court for an order for the --

8 THE COURT: Time out one second, we didn't get you
9 on the record, did we, Ms. Zimmerman?

10 MS. ZIMMERMAN: No, officially you did not, Your
11 Honor. Genevieve Zimmerman for the MDL plaintiffs. We have
12 not filed position papers here --

13 THE COURT: You're just here to observe, and you
14 represent the plaintiffs.

15 MS. ZIMMERMAN: That's correct, Your Honor.

16 THE COURT: I'm sorry to interrupt. Go ahead,
17 Ms. Lewis.

18 MS. LEWIS: Thank you, Your Honor. Again, on
19 behalf of defendants 3M Company and Arizant Healthcare,
20 defendants are asking for an Order for the Miami Veterans
21 Administration Medical Center for an Order for three things,
22 as we have in our papers:

23 One, we want, in response to our subpoena,
24 relevant documents produced that are germane to the Veterans
25 Administration's Medical Center's procedures.

1 Two, we are asking for the depositions of two key
2 witnesses, two treating physicians. One is the surgeon who
3 actually performed all three surgeries on Mr. Nugier. The
4 other treating physician is the infectious disease
5 physician.

6 The third thing we are asking for is a deposition
7 of a hospital representative who can answer questions that
8 are central to the case. For example, information about
9 Bair Hugger use at the hospital, information about service
10 and maintenance on the Bair Hugger warming system,
11 information about infection control since infection and
12 surgical site infections are a key issue in this case.

13 We also want information about the ventilation
14 system in the operating room, again, because one of
15 plaintiff's central themes is air flow and disruption of air
16 flow. So those are some of the key issues that are central
17 to the case in which we want information from the hospital.

18 This particular case involves Mr. Nugier, who is
19 one of the two bellwether cases that have been selected for
20 trial. Mr. Nugier had his surgeries, all three surgeries at
21 the actual VA Medical Center. His surgery was performed in
22 2012. I know that is some time ago, but that's what we have
23 before us.

24 As Your Honor is well aware, our discovery cut-off
25 is middle of October, October 16th, and so time is of the

1 essence, and we have been working on this since early
2 August, since August 4th trying to get started getting some
3 documents and getting depositions scheduled for the treating
4 physicians.

5 But because this is a bellwether case and
6 bellwether trial, discovery must be thorough and fair
7 because, as we know, the trial outcome will have a
8 substantial impact on future cases. And so if this
9 discovery is not accurate, complete, and fair, at least to
10 defendants, and probably to both parties, it will have a
11 significant impact on the future. And so that's why this is
12 extremely important for this discovery to go forward.

13 We don't believe there's any other means to obtain
14 the relevant data, for example, for the surgeon. He was the
15 only surgeon who performed all three surgeries.
16 Unfortunately, based on my years of experience, medical
17 records don't provide sufficient information in detail
18 that's needed in order to prepare for a trial on the actual
19 surgery and circumstances surrounding the surgery.

20 So we believe that a deposition of the treating
21 physician is necessary because there is no other means in
22 order to obtain data about the surgery and the details of
23 the surgery.

24 THE COURT: Do you think this guy is going to
25 remember something that happened five years ago?

1 MS. LEWIS: He may not, but at least we asked.

2 THE COURT: It's the VA. It's not like he doesn't
3 have a volume of cases presumably.

4 MS. LEWIS: Completely understandable, but all we
5 can do is ask. It's better to ask and have him say no then
6 to question whether he may have remembered, and we didn't
7 get the opportunity to ask him.

8 The same is true for the infectious disease
9 physician. Again, Lichtenberger is the infectious disease
10 physician. It's the physician who was the attending
11 physician and also made the diagnosis of the joint
12 infection. So, again, we don't believe there is another
13 means to obtain that relevant data other than to ask that
14 particular physician questions. Again, we hope that the
15 medical records may prompt something that they may remember
16 even though it may be five years ago.

17 We have been in communications with Mr. Fuller.
18 We had a conversation just this morning. We also spoke this
19 last Friday, and there was some discussion on what could be
20 done as some sort of compromise. The discussion heretofore
21 was whether a FOIA request was appropriate. We don't
22 believe so for several reasons:

23 Number one, we believe it would take too much time
24 to get a response to a FOIA request. And we believe if
25 you're going to ask for a FOIA request, why couldn't you do

1 the same document production in response to a subpoena?

2 So timing, again, is super critical. We just
3 believe it would take way too much time to get a FOIA, at
4 least with respect to the documents.

5 I'll inform the Court, and Mr. Fuller will
6 probably talk about it more fully, but this past Friday we
7 learned for the first time, we had a conversation with
8 Mr. Fuller, as well as Ms. Barbara Kehoe, who is in Florida
9 who informed us that, number one, she is looking for
10 documents but at this point has not found any. And, of
11 course, we know Hurricane Irma has occurred since we filed
12 this. She said that the hospital is sort of in clean-up
13 mode, but at this point we still don't have any documents,
14 and she hasn't given a definitive answer on if there in fact
15 documents. She is checking.

16 We had discussions on whether it would be
17 appropriate for deposition or written questions to the
18 treating physicians and to the hospital representative, and
19 we were discussing that this morning. Mr. Fuller mentioned
20 that Ms. Kehoe may be willing to allow a deposition of
21 written questions, followed up with a one hour maybe
22 deposition by phone. Again, based on my years of
23 experience, and the experience in this particular MDL, we
24 don't believe one hour would be sufficient because both
25 parties would be entitled to ask questions of the treating

1 physician. So although we're trying to work some things
2 out, at this point, we haven't worked it out where it's
3 satisfactory, at least to defendants.

4 The other thing that's important to bring to the
5 Court's attention is that on Friday, Mr. Fuller and
6 Ms. Kehoe informed us that Mr. Nugier's surgery was not
7 actually performed in the medical center's regular operating
8 room. Instead his surgery was performed in a temporary
9 trailer that was brought on to the facility at the hospital
10 because the operating room is under construction or
11 renovation.

12 So that raises even more questions for us since
13 the theories, several theories of plaintiff has to do with
14 the environment within the OR. So now that we know there's
15 this temporary trailer, we know nothing about it, and
16 there's so many questions that we need answered. How large
17 is it? What's the operating room look like? How long has
18 it been there? Was anything differently done with respect
19 to this particular surgery that would not have been done in
20 the regular OR? So this new revelation is all the more
21 reason that we really need to ask questions.

22 Ms. Kehoe also mentioned with respect to these
23 trailers that she does not believe they still have documents
24 with respect to who are the vendors for these trailers, and
25 so we don't even know that there are documents about it. So

1 again --

2 THE COURT: When you say that Ms. Kehoe is looking
3 for documents, is she looking for paper documents or is she
4 searching electronic records somehow? Or don't we know the
5 answer to that?

6 MS. LEWIS: I'm not sure which. According to Mr.
7 Fuller, and he can explain more fully, at least -- I don't
8 know, again, if they're electronic or not. My guess is they
9 may be paper. Some may be paper documents.

10 THE COURT: And this trailer business, was that
11 for all three surgeries? Or was that just for the first
12 surgery, the last surgery, the middle surgery or?

13 MS. LEWIS: That's what we need to find out. I
14 believe Ms. Kehoe mentioned the first surgery, and, again,
15 Mr. Fuller may have a better recollection of whether it was
16 all three or not. But the first surgery, of course, was the
17 surgery on his knee.

18 THE COURT: The one that resulted in the
19 infection.

20 MS. LEWIS: Correct. The other two surgeries were
21 treatment for the infection, so sort of revision surgeries.

22 So, again, although we have been in discussions
23 trying to work things out, at this point, we still aren't at
24 a point where we believe there would be sufficient discovery
25 on behalf of defendants to find out as much information as

1 we really need in order to have a fair trial. And so as our
2 papers mentioned, we believe, you know, outright denial is
3 sort of arbitrary and capricious based on several cases that
4 we've cited.

5 We've cited the *Ohio Health v. The Veterans*
6 *Administration*, as well as the *Rhoads* case, which we believe
7 both talk about the fact that in cases similar to ours where
8 it involved physicians, and the work, whether it was surgery
9 or otherwise, but treatment provided by our physician. It
10 was determined in those two cases that it was arbitrary and
11 capricious to outright deny access to the documents and the
12 data and to talk to the physicians.

13 THE COURT: But you do concede, do you not, that
14 the VA and the government agency is different than a private
15 entity that you might be seeking documents from?

16 MS. LEWIS: We understand, and we did put in our
17 papers. We know about the *Touhy* regulations, and we believe
18 that we complied with them and comported to what they
19 required and the various factors that need to be considered.
20 But because this is a bellwether case that will
21 significantly impact all future cases, because we don't have
22 any other means to gather that data, and that was one of the
23 things that was mentioned in the *Rhoads* case, the treating
24 physicians had personal knowledge of what happened during
25 the treatment of the patient, and there was no other place

1 to get that data. In other words, to obtain that relevant
2 data.

3 So even though, yes, the Veterans Administration
4 does have some protections, the courts have not said
5 outright that they are not required to do anything, that
6 they can totally deny and refuse any discovery whatsoever.

7 THE COURT: Okay. Thank you. Mr. Fuller?

8 MR. FULLER: Thank you, Your Honor. Good morning.
9 I probably have a somewhat different perspective of the
10 paradigm here. I think that we're in a little bit of a
11 different world when we're talking about discovery against
12 the federal government or federal agency. Certainly,
13 understandably, counsel focuses on relevance and importance
14 to the case that is an ongoing private litigation here, but
15 this is not a typical discovery request where you have a
16 sovereign immunity backdrop and the government has not
17 waived its immunity where it's not a party in a situation
18 like this. You have to look to the regulatory context. So
19 it's not simply that these regulations happen to be out
20 there and provide some additional protections, but that
21 becomes the framework through which to view the request, and
22 so the subpoenas don't directly apply and that's why we move
23 to quash them.

24 What's controlling is counsel's letters to the
25 deciding official at the agency explaining how the

1 regulatory factors are met here, and those letters hardly
2 addressed the *Touhy* factors, the VA's regulatory factors.

3 By contrast, the response was based on the
4 applicable factors, and looking at the particular
5 regulations that apply here under the VA, the main duty of
6 the deciding official, I would submit, is to advance the
7 mission of the agency in particular by preserving the time
8 of the busy doctors here and to ensure that the vets get
9 served.

10 Now, there are also special protections in place
11 such as a prohibition, unless there's extraordinary
12 circumstances against expert testimony, and the so-called
13 quality assurance privilege. All those things are thrown
14 into the mix, and we're sort of bumping up against these
15 sort of problematic issues as --

16 THE COURT: Do you agree or disagree with
17 Ms. Lewis that these cases that she cites stand for the
18 proposition that the outright denial of any discovery at all
19 would be arbitrary and capricious?

20 MR. FULLER: Well, I apologize if there's
21 something that I missed, but I don't recall that there was a
22 *Touhy* decision cited that was on point in that sense, so I'm
23 actually unfamiliar with the details of those particular
24 cases.

25 THE COURT: Okay. And it's your contention that

1 quashing the subpoena outright in saying they get nothing
2 would be an appropriate outcome and that's the relief you're
3 seeking?

4 MR. FULLER: That is correct. And on the other
5 hand, I don't disagree with the factual information that was
6 provided here at the end of the discussion by Ms. Lewis.
7 And I would also submit that, or I just wanted to remind the
8 Court and all of us that Ms. Kehoe at the very outset, you
9 know, the circumstances are set forth in our brief, but she
10 offered an alternative from the start, which was
11 entertaining written questions. And from my perspective, it
12 would be wise of the defendants to get moving and get those
13 questions submitted. The denial decision was not arbitrary
14 and capricious, and our position is that the motion to
15 compel should be denied and that the subpoenas should be
16 quashed.

17 THE COURT: Does the offer of written questions
18 factor into the analysis of whether the denial is arbitrary
19 and capricious? In other words, is it a different question
20 if the facts were subpoena served, Kehoe says, no, screw
21 off, leave us alone, we're too busy. Or -- that's one
22 scenario.

23 Or, second, is it a different question or the same
24 question if the response to the subpoena is, oh, gee, we
25 don't really have to do this, recognize you've got some

1 issues. Hey, how about the written question thing? We'd be
2 willing to do that. And then no agreement is reached, so
3 it's denied.

4 Are those two different questions or is the legal
5 analysis the same, they're just denials of requests for
6 discovery?

7 MR. FULLER: In my view, the fact of the deciding
8 official having offered the written question option is a
9 factor that the Court should consider, and so I think it's a
10 different question in light of the full circumstances here.

11 THE COURT: Okay.

12 MR. FULLER: And I'm happy to speak to any of the
13 back and forth that we've had or any of the information that
14 might be helpful again to the Court.

15 THE COURT: What is the last offer that the
16 government has made? Is it the written questions plus the
17 one hour telephonic deposition?

18 MR. FULLER: Yes. And the way I would
19 characterize that is that that would be the offer. Well,
20 let me back up to clarify.

21 The deciding official at the agency has not yet
22 agreed that the one-hour followup could be in the form of a
23 deposition testimony under oath. At the very least though,
24 she is willing to agree that depending on how things go with
25 these written questions, that there would be an opportunity

1 with respect to both doctors and, hopefully and presumably,
2 someone at the agency who could speak to the issues of
3 concern in the 30(b)(6) subpoena. That there would be an
4 opportunity for counsel to get on the phone, probably with
5 agency lawyer, probably with myself or someone at the local
6 U.S. Attorney's Office, and have a direct back and forth
7 with the --

8 THE COURT: With each of the three witnesses, two
9 doctors and 30(b)(6) person?

10 MR. FULLER: That is my understanding, yes.

11 THE COURT: So it would be three hours worth of
12 testimony?

13 MR. FULLER: That's my understanding, yes.

14 THE COURT: Okay.

15 MR. FULLER: And the weather has not helped in the
16 last 10 days for obvious reasons.

17 THE COURT: Where is the VA again? What city?

18 MR. FULLER: This is in Miami. We did have a
19 discussion, telephonic on Friday, as well as a followup few
20 discussions that I had this morning. I would just say that
21 Ms. Kehoe is making progress on trying to be helpful
22 including tracking down documents, and my understanding is
23 that they are paper documents as well as electronic
24 documents. She's undertaking a search for at least certain
25 of the documents that the defendant has requested, but it's

1 in flux, and I would say the same thing about the
2 information about where the surgery took place. I don't
3 have a complete understanding of that. That was new
4 information given to me on Friday. I understand that it did
5 relate to the first surgery that has been mentioned.

6 THE COURT: Only the first surgery or to the first
7 surgery and the other two?

8 MR. FULLER: I don't know the answer to that.

9 THE COURT: Okay.

10 MR. FULLER: We're all sort of learning as we go.

11 THE COURT: And the time lag between the first
12 surgery, which as I understand it, is the one where the
13 infection is alleged to have been contracted, and the middle
14 surgery, which was to treat the infection, and then the
15 third surgery was to re-do the knee, is that --

16 MR. FULLER: I don't know the timing. I don't
17 remember.

18 THE COURT: Okay. Anything else?

19 MR. FULLER: I'm sure counsel who has been
20 involved in the case would know more.

21 THE COURT: Okay.

22 MR. FULLER: No, I just reiterate though that the
23 written questions are probably going to be very helpful to
24 all involved, but it's unclear what would happen if there
25 were a Court Order to compel anyone to do anything and that

1 may just drag things out more.

2 THE COURT: Okay. Ms. Zimmerman, is Nugier your
3 client or is that a Florida lawyer involved in all of this?

4 MS. ZIMMERMAN: There is a Texas law firm involved
5 in representing Mr. Nugier, and I was hoping that I would
6 not have to address the Court at all as we kind of find
7 ourselves a little bit in the middle of the position here.
8 We agree with the defendants, and we're prepared to join in
9 the motion to a certain extent, as we think that the
10 information is in fact necessary to work up these cases for
11 bellwether.

12 I will say that given what I've heard this
13 morning, I would reiterate our position and what I thought
14 was our agreement about contracting treaters because it
15 sounds like there's been a great deal of information that's
16 been learned about Mr. Nugier's surgeries, particularly on
17 Friday, that I'm hearing for the first time in this court.

18 So to the extent that there are ongoing
19 conversations with defense counsel and with the government
20 about the plaintiff at issue and his medical care, the
21 plaintiff certainly reiterate their request that they be
22 involved in those conversations because this is not mere
23 scheduling. This is really quite substantive.

24 At the same time, the plaintiff find themselves
25 aligned with the government to a certain extent as well,

1 because, and I think that the government articulates this in
2 the briefing, there are federal limitations with respect to
3 this, what I think is an attempt by defendants to cross over
4 from understanding what kind of treatment Mr. Nugier
5 required at the VA, because the actual requests from 3M ask
6 about experience with the Bair Hugger, efficacy, things that
7 touch on expert issues. And I do think that there's a line
8 that this Court can and should draw with respect to the
9 information sought from the treaters down in Miami when we
10 get there.

11 Now, I think that probably there's a middle ground
12 that we could meet if the parties, both the plaintiffs and
13 the defendants and the government, were to work together to
14 see if we could reach agreement on obtaining documents,
15 obtaining depositions partially perhaps by a written
16 question and partially by a telephone deposition, but it
17 seems to me based on some of the information that was gained
18 on Friday, we may need to discuss representativeness and
19 some other issues with respect to bellwether status from
20 Mr. Nugier as well.

21 THE COURT: Okay.

22 MS. ZIMMERMAN: Thank you.

23 THE COURT: Thank you. Anything else? I'm going
24 to go over here, but, Mr. Fuller, do you have anything?

25 MR. FULLER: I just wanted to add for the record

1 that to me the comments of plaintiff's counsel just now
2 underscore the reasonableness of the denial here because one
3 of the factors involved is an appearance of favoritism in a
4 lawsuit such as this, and where one of the parties happens
5 to be a veteran, there's a heightened concern that the
6 veteran may feel slighted or may be hesitant avail himself
7 of the VA services, and so that was one of the factors that
8 went into the decision here.

9 THE COURT: Is there any -- one of the
10 complicating factors that's not present, as I understand it,
11 that both of these doctors are still employed by the VA and
12 are accessible and within the control of the United States?

13 MR. FULLER: That is accurate.

14 THE COURT: Thank you. Ms. Lewis, anything else?

15 MS. LEWIS: Just short, Your Honor. With respect
16 to the deposition of written questions and a follow-up time,
17 we believe the amount of time it would take to prepare
18 answers to the questions plus prepare for the deposition
19 would be about the same amount of time that we would want
20 for the deposition itself. So I'm not sure it saves those
21 physicians additional time to do both.

22 Our suggestion and request is that we just go
23 forward with a deposition. We could limit it to four hours.
24 That would give both parties a chance to ask questions that
25 they deem important. And so, and with respect to the

1 conversation with Mr. Fuller, it was strictly
2 administrative. We were trying to negotiate what we were
3 going to do. It was Ms. Kehoe who mentioned that he was in
4 a trailer, so nothing beyond that was unfold, so there was
5 no substantive discussion about Mr. Nugier's treatment
6 during that conversation.

7 THE COURT: Okay. Thank you.

8 MR. FULLER: I'm sorry, is it acceptable for me to
9 add one more point, Your Honor?

10 THE COURT: Go ahead.

11 MR. FULLER: Just to be clear, I have raised this
12 exact question with the agency counsel and Ms. Kehoe, who
13 knows how things work within the VA. It is very clear that
14 written questions with followup in her experience will be
15 much more efficient from the doctor's perspective.

16 THE COURT: Let me ask you this about one of the
17 government's positions, as I understand it, with respect to
18 the production of documents at least is that there should be
19 a Freedom of Information Act request. Is it the
20 government's position that when that comes in it would sort
21 of get to the end of the line of all of the other Freedom of
22 Information Act requests that the VA might be responding to
23 and go through the ordinary course? Or is there -- I guess
24 I'm trying to figure out what's the distinction between
25 responding to a request for documents as opposed to a

1 Freedom of Information Act request as a practical matter?

2 MR. FULLER: As a practical matter, the FOIA
3 request gets processed by a certain, you know, a specific
4 office that is for that purpose, and they're very familiar
5 with the exceptions and what can and can't go out and what
6 needs to be redacted under the FOIA law. And I haven't dug
7 in and had much of a detailed conversation with Ms. Kehoe
8 about that avenue. But in my experience with other
9 situations, other agencies, at least, it's sometimes
10 possible to reach an agreement that a FOIA request can be
11 expedited. So that's just something I'll put out there not
12 as an offer, but just as information.

13 THE COURT: All right. Anything else from
14 anybody? Ms. Zimmerman?

15 MS. ZIMMERMAN: No, Your Honor.

16 MS. LEWIS: No, Your Honor.

17 THE COURT: All right. Well, here's what I'm
18 going to do. First, I'm going to take the matter under
19 advisement. And today is September 18th. I plan to enter
20 an order no later than Friday, September 22nd. And I would
21 urge all three lawyers who are in the courtroom, as well,
22 Ms. Zimmerman, if you need to engage the Texas firm who is
23 Mr. Nugier's counsel, to chat amongst yourselves and see if
24 you cannot reach an agreement. And I would urge you all to
25 try to reach an agreement, because as I read the law, it

1 strikes me that the government's position is largely in some
2 ways supported by the law, whether the law is just or not is
3 a different question. So if you can reach some agreement,
4 it would be in the interest of all concerned, I think, to
5 reach an agreement and move forward with it.

6 Notify me by e-mail to the chambers e-mail account
7 by Friday, the 22nd, if you have reached an agreement. And
8 if you have not, I will issue an Order. Actually, notify me
9 by Thursday night, close of business Thursday the 21st, and
10 if you have not reached agreement, I will enter an Order on
11 Friday. Anything else?

12 MS. LEWIS: No. Thank you, Your Honor.

13 MS. AHMANN: Thank you.

14 MR. FULLER: Thank you, Your Honor.

15 THE COURT: Okay. We are in recess.

16 (Court adjourned at 10:03 a.m.)
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18 * * *

19 I, Maria V. Weinbeck, certify that the foregoing is
20 a correct transcript from the record of proceedings in the
21 above-entitled matter.
22

23 Certified by: s/ Maria V. Weinbeck

24 Maria V. Weinbeck, RMR-FCRR
25